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JUTA RASMI (M) SDN BHD v. MAGILDS PARK SDN BHD

HIGH COURT MALAYA, SHAH ALAM
AMELIA TEE ABDULLAH J
[CIVIL APPEAL NO: 12A-NCVC-13-12-2014]
30 JUNE 2015

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CONTRACT: *Void contract – Void for illegality – Allegation of – Appellant company wound up before entering into infrastructure contract – Whether directors had authority to enter into contract – Whether stay of winding up order had retrospective effect to validate entering into contract – Failure to obtain sanction or approval of official receiver when entering into contract – Whether contract void and unenforceable – Whether appellant entitled to compensation for works done – Failure to come to court with clean hands – Whether appellant entitled to quantum meruit – Whether appellant entitled to invoke s. 66 Contracts Act 1950*

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CONTRACT: *Claim for works done – Infrastructure contract – Appellant company wound up before infrastructure contract issued – Whether contract void ab initio – Whether appellant entitled to compensation for works done – Appellant entered contract without official receiver's sanction and approval – Failure to come to court with clean hands – Whether appellant entitled to quantum meruit – Contracts Act 1950, s. 66*

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COMPANY LAW: *Winding up – Stay – Whether stay of winding up order had retrospective effect to validate entering into infrastructure contract – Failure to obtain sanction or approval of official receiver when entering contract – Whether contract void and unenforceable*

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The appellant, Juta Rasmi (M) Sdn Bhd, was awarded an infrastructure contract by the respondent, Magilds Park Sdn Bhd, valued at RM1,952,093.60. The appellant claimed against the respondent the sum of RM427,318.75 as outstanding payments for work done. The respondent, in its defence and counterclaim, disputed the claim on the ground that the infrastructure contract was void for illegality as the appellant had been wound-up even before the contract was issued. Thus, the respondent counter-claimed for a sum of RM750,193.50 for loss and damages as a result of the appellant's misrepresentation and alternatively for damages. *Vide* a notice of application, the respondent had applied for the disposal of the case on point of law under O. 14A of the Rules of Court 2012. The Sessions Court Judge ('SCJ') had allowed the respondent's application. Dissatisfied with the said decision, the appellant appealed. The appellant submitted that (i) even if the court were to hold that the contract was void because the winding-up order was in force, the appellant would still be entitled to payment based on *quantum meruit* and unjust enrichment; (ii) the appellant was solvent at the time that it entered into the infrastructure contract and that payment had been made by the appellant to the appellant's creditors before the infrastructure contract was entered into even though the perpetual stay of the winding up

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order was only obtained on 24 July 2013; (iii) even if the contract between the parties was void, the appellant would still be entitled to compensation for works that it had carried out; and (iv) the appellant relied on s. 54 of the Bankruptcy Act 1967 which provides protection to *bona fide* transactions without notice. In response to the appellant's submissions, the respondents submitted that (i) the infrastructure contract was void and unenforceable against the respondent as the appellant was a wound-up company when its directors entered into the infrastructure contract, contravening s. 11 of the Contracts Act 1950; (ii) the directors of the appellant did not have the capacity to enter into the infrastructure contract as its board of directors had become *functus officio* once the appellant was wound-up; and (iii) the directors of the appellant had failed to obtain the sanction or approval of the official receiver when entering into the infrastructure contract.

Held (dismissing appellant's appeal with costs):

(1) The appellant, at the time that it entered into the infrastructure contract to carry out infrastructure works, was a company under liquidation. The infrastructure contract was entered into on 21 December 2012. Based on established authorities, once the appellant was wound up, its board of directors becomes *functus officio* and would have no authority to enter into the infrastructure contract (*American International Assurance Berhad v. Coordinated Services L Design Sdn Bhd*, refd). (para 29)

(2) Whilst the appellant may have obtained a perpetual stay of the winding-up order on 24 July 2013, following the decision in *American International Assurance Berhad*, that stay could only take effect from that date and would not have retrospective effect to the date of the winding-up order. In the circumstances, the court finds that the stay order would clearly not have any retrospective effect to validate the entering into of the infrastructure contract on 21 December 2012, notwithstanding that the appellant may well have made full payment to its creditors. (para 29)

(3) Apart from the fact that the infrastructure contract was void *ab initio*, the appellant would still be disentitled to its claim for the RM423,818.75 because it had only produced a progress claim and the said claim was not certified. In light of the clear wording in cl. 9 which states that payment shall be made after issuance of the certificate payment, and since no certificate was ever issued to verify the work that was done, the issue of whether payment for the sum of RM423,818.75 or any other sum was due would not arise. (para 29)

(4) The appellant's attempt to rely on s. 66 of the Contracts Act 1950 was clearly unsustainable as the said provision meant to provide some relief to a party whose right in an agreement becomes unenforceable through no fault of his. Herein, the appellant knew that only the official receiver could act for it after its winding-up; that it had entered into the

infrastructure contract without the sanction or approval of the Official Receiver and as such would not be entitled to invoke s. 66 of the Contracts Act 1950. (para 29)

(5) The appellant would not be entitled to claim in *quantum meruit* not just because the amount and value of the work allegedly done had not been certified, but also because the appellant had not come to court with clean hands. It was as a result of the appellant's actions in entering into the infrastructure contract when it was still a wound-up company and failing to obtain the approval and sanction of the official receiver to enter into the said contract, that the appellant had found itself in the present position. (para 29)

Case(s) referred to:

American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2012] 1 CLJ 506 CA ***(foll)***

Hydro Pro Sdn Bhd lwn. Aqeel Engineering & Construction Sdn Bhd [2011] 1 LNS 1498 HC ***(refd)***

JA Sullivan Corporation v. Commonwealth [1986] 397 Mass 789 ***(refd)***

Lau Kee Ko & Anor v. Paw Ngi Siu [1973] 1 LNS 71 FC ***(refd)***

Soh Eng Keng v. Lim Chin Wah [1979] 1 LNS 98 HC ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***

The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd [2013] 4 CLJ 820 CA ***(refd)***

Yee Hoong Loong Corpn Sdn Bhd v. Kwong Fook Seng Co [1993] 1 CLJ 90 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 54
Companies Act 1965, ss. 243, 283
Contracts Act 1950, ss. 11, 66
Rules of Court 2012, O. 14A

For the appellant - Ng Han Teong; M/s Jasbeer, Nur & Lee
- Mohana Priya; M/s Zarina, GT Vanan & Assocs
For the respondent - Gillian Looh; M/s Izral Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Amelia Tee Abdullah J:

[1] The appellant, Juta Rasmi (M) Sdn Bhd, was awarded an infrastructure contract by the respondent, Magilds Park Sdn Bhd, valued at RM1,952,093.60. The appellant's claim against the respondent was for a sum of RM427,318.75 for outstanding payments for work done. The respondent, in its defence and counterclaim, had disputed the claim on the ground that the infrastructure contract is void for illegality as the appellant

had been wound up even before the contract was issued. It had counterclaimed for a sum of RM750,193.50 for loss and damage as a result of the appellant's misrepresentation and alternatively for damages.

[2] *Vide* a notice of application dated 18 July 2014, the respondent had applied for the disposal of the case on point of law under O. 14A of the Rules of Court 2012. On 7 November 2014, the learned Hakim Mahkamah Sesyen ("HMS") had allowed the respondent's application and had ordered as follows:

(1) Surat Penerimaan bertarikh 21.12.2012 untuk Kerja-Kerja Infrastruktur yang dimasuki oleh Pengarah-Pengarah Plaintif dengan Defendan semasa Plaintif masih sebuah syarikat yang digulungkan adalah tidak sah dalam undang-undang dan tidak boleh dikuatkuasakan terhadap Defendan;

(2) Perintah Penggantungan bertarikh 24.7.2013 yang diperolehi oleh Plaintif tidak mempunyai kesan untuk mengesahkan Surat Penerimaan bertarikh 21.12.2012 secara retrospektif;

(3) Dalam kesemua keadaan, Plaintif tidak berhak untuk mengekalkan tuntutannya untuk jumlah sebanyak RM423,818.75 bersama dengan faedah terhadap Defendan.

[3] Being dissatisfied with the decision of the learned HMS made on 7 November 2014, the appellant had filed an appeal to the High Court.

The Facts

[4] The brief facts of the case are as follows. On 9 November 2012, the appellant had tendered for the infrastructure contract. *Vide* a letter of acceptance dated 21 December 2012 issued by SCCT Consulting Sdn Bhd, the respondent had accepted the appellant's quotation and appointed the appellant to carry out infrastructure works.

[5] On 18 March 2013, the appellant issued Progress Claim No. 1 for a sum of RM423,818.75. Shortly after the issuance of Progress Claim No. 1, the appellant suspended the carrying out of the infrastructure contract. This led the respondent to issue a letter dated 2 May 2013 giving 14 days notice to the appellant to carry out its duties under the infrastructure contract failing which the said contract would be deemed to be determined.

[6] On 29 May 2013, the respondent carried out a company search on the appellant with the Companies Commission of Malaysia and found that the appellant had been wound up and the official receiver appointed as liquidator on 20 June 2012. The respondent had also confirmed that the official receiver had not given its consent or authorisation for the appellant to enter into the infrastructure contract.

[7] On 6 November 2013, the respondent received a letter of demand from the appellant's solicitors demanding payment for a sum of RM423,818.75 for the purported work done under the infrastructure contract. The respondent's response *vide* their solicitors' letter dated 28 November 2013 was to refute the appellant's claim on the basis that, at all material times, the appellant was a wound up company and that any works purported to have been done was without the consent and authorisation of the official receiver and therefore illegal and void in law.

[8] On 24 July 2013, the appellant had obtained a stay of the winding-up order dated 20 June 2012. However, the respondent contends that the stay order does not have the effect of retrospectively validating the infrastructure contract entered into by the appellant.

The Appellant's Submissions

[9] The appellant's submissions can be summarised as follows:

(i) the respondent had never disputed that work was carried out by the appellant. Thus, even if the court were to hold that the contract was void because the winding-up order was in force, the appellant would still be entitled to payment based:

(a) *quantum meruit*; and

(b) unjust enrichment;

(ii) the appellant was solvent at the time that it entered into the infrastructure contract. Full payment had been made by the appellant to the appellant's creditors before the infrastructure contract was entered into even though the perpetual stay of the winding up order was only obtained on 24 July 2013; and

(iii) the application of s. 54 of the Bankruptcy Act 1967.

Quantum Meruit And Unjust Enrichment

[10] The appellant argues that even if the infrastructure contract is void, however the appellant's claim should still be allowed based on the principles of *quantum meruit* and unjust enrichment. Reliance was placed on the case of *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786 where the Court of Appeal held that:

> (e) when work is done under a void contract (this envisages the situation where a contractor carries out work or renders services under a contract subsequently found to be void, the contractor is entitled to a *quantum meruit* for the work or services (*Craven-Ellis v. Canons, Limited* [1936] 2 KB 403, CA; and *Rover International Ltd, and Others v Cannon Film Sales Ltd.* [1989] 1 WLR 912 CA)).

[11] The appellant further submits that even if the contract between the parties is void, the appellant would still be entitled to compensation for work that it had carried out. In this regard, reliance was placed on s. 66 of the Contracts Act 1950 which states as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[12] Learned counsel for the appellant had also relied on a number of authorities such as *Yee Hoong Loong Corpn Sdn Bhd v. Kwong Fook Seng Co* [1993] 1 CLJ 90; *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141 and *The Ayer Molek Rubber Company Bhd v. Bintang-Bintang Sdn Bhd* [2013] 4 CLJ 820.

The Appellant Was Solvent

[13] The appellant further submits that although the order for a perpetual stay of the winding-up order was only obtained on 24 July 2013, full payment to the appellant's creditors had been made prior to the date of the appellant's appointment on 21 December 2012. The appellant had paid the amount outstanding on or about September 2012 and this had been confirmed by the petitioner's solicitors *vide* their letter dated 22 October 2012. As such, the appellant contends that the infrastructure contract entered into on 21 December 2012 with the respondent was a legal contract.

Section 54 Of The Bankruptcy Act 1967

[14] The appellant had also relied on s. 54 of the Bankruptcy Act 1967 which provides protection to *bona fide* transactions without notice. The appellant sought to distinguish the case of *American International Assurance Bhd v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506 relied upon by the respondent with the facts of the instant case. It was pointed out that in *American International Assurance (supra)*, the respondent's debts had not been settled and it was because of that reason that the Court of Appeal, in granting a perpetual stay, had decided that the stay would not carry any retrospective effect. However, in the present case, there were no monies outstanding to the petitioner of the winding-up action.

An Alternative Argument

[15] Alternatively, the appellant argues that the company search on the appellant was conducted by the respondent nearly six months after the appointment of the appellant on 21 December 2012 and after the progress claim was issued by the appellant. The appellant contends that this would show the *mala fide* on the part of the respondent who was attempting to find reasons to terminate the infrastructure contract with the appellant without having to pay for work that had been done by the appellant.

A *The Respondent's Submissions*

[16] The respondent had referred to its submissions before the Sessions Court. In summary, and in response to the appellant's submissions, the court notes the respondent's submissions would be in respect of the following areas, namely:

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(i) whether the letter of acceptance dated 21 December 2012 ("infrastructure contract") is void;

(ii) whether the stay of the winding-up order dated 24 July 2013 can retrospectively validate the infrastructure contract;

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(iii) whether the appellant can maintain its claim for the sum of RM423,818.75; and

(iv) *quantum meruit* and unjust enrichment.

Whether The Infrastructure Contract Is Void

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[17] The respondent submits that the infrastructure contract is void and unenforceable against the respondent for the following reasons:

(i) the appellant was a wound-up company when its directors entered into the infrastructure contract with the respondent on 21 December 2012. By entering into the infrastructure contract, the appellant's directors have contravened s. 11 of the Contracts Act 1950 which states *inter alia* that a person is competent to contract if he is not disqualified from contracting by any law to which he is subject. The appellant, as a company in liquidation, does not have legal capacity to enter into a contract;

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(ii) the directors of the appellant do not have capacity to enter into the infrastructure contract. Once the appellant is wound up, its board of directors becomes *functus officio*. The liquidators displace the directors and the control and activities of the appellant is vested in the liquidator. No one but the liquidator can act for the appellant (See *American International Assurance Berhad v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506); and

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(iii) the directors of the appellant had failed to obtain the sanction or approval of the official receiver when entering into the infrastructure contract.

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[18] As such, the respondent submits that the infrastructure contract is void in law, all its terms are void and thus the contract cannot be enforced in law. The Federal Court in *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd (supra)* had stated clearly as follows:

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> ... a void contract or agreement cannot be enforced by law. When a contract or agreement is void, the whole terms in the contract are void and cannot be enforced. No term in the said contract can be spared.

The Federal Court went on to say that where the contract is void, no court ought to lend assistance to give effect to it.

Whether The Stay Of The Winding-Up Order Dated 24 July 2013 Can Retrospectively Validate The Infrastructure Contract

[19] The respondent submits that the appellant's contention that the infrastructure contract is valid as it had settled its debts on or about September 2012, and the winding-up order was stayed *vide* a perpetual stay dated 24 July 2013, is devoid of merits and untenable because the stay of the winding-up order would only become operative from the date of the stay and not from the date of the winding-up order. As held by Ramly Ali JCA in *American International Assurance Bhd (supra)* at p. 516:

> A stay order under s. 243 of the Companies Act 1965 takes effect from the date of pronouncement of the stay and not from the date of the winding-up order. Therefore **a stay** does not wipe the winding-up order from existence but would **only be operative from the date of the passing of the stay order**.
>
> (emphasis added)

[20] Learned counsel for the respondent has also submitted that any retrospective validation of dealings and agreements entered into when the appellant is a wound-up company would be against the purpose of s. 243 of the Companies Act 1965 and "cannot be allowed to stand as the effect on commercial reality is adversely far reaching" (See p. 516 of *American International Assurance Bhd*).

Whether The Appellant Can Maintain Its Claim For RM423,818.75

[21] The respondent submits that the appellant is not entitled to maintain its claim for RM423,818.75 because the infrastructure contract is void *ab initio* since the appellant had entered into the said contract while it was still a wound-up company, and without the sanction or approval of the official receiver.

[22] The respondent further submits that even if the infrastructure contract was held to be valid, the appellant would still not be entitled to the said sum in payment as no certificate of payment had been issued in this case. The appellant had only produced a progress claim or a request for certification of claim to SCCT Consulting which had not issued any payment certificate to the appellant.

[23] Clause 9 of the letter of acceptance in relation to terms of payment states as follows:

> Payment shall be made not later than 30 days after issuance of certificate of payment and shall be based on the actual progress of work on site which based on client sectional work completion requirement.

[24] And since no certificate from SCCT Consulting was issued to verify the work which the appellant claims to have done, thus the appellant's right to payment would not arise.

Quantum Meruit

[25] The respondent submits that the appellant is not entitled to claim in *quantum meruit*. Reference was made to the case of *Hydro Pro Sdn Bhd lwn. Aqeel Engineering & Construction Sdn Bhd* [2011] 1 LNS 1498 (Guaman Civil D-22-589-2009) where Mohd Zawawi Salleh J (as he then was) referred to the case of *J.A. Sullivan Corp v. Commonwealth*, 397 Mass 789, 793 (1986) for an elucidation as to what the term '*quantum meruit*' entails:

> *Quantum meruit* is a theory of recovery, not a cause of action. It is a claim independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself. Recovery under this theory is derived from the principles of equity and fairness and is allowed where there is substantial performance but not full completion of the contract. See generally 5 S. Williston, Contracts Section 805 (3 ed. 1961).

[26] As such, the respondent argues that since the relief sought is equitable in nature, the appellant's conduct must be examined because it is settled law that he who comes to equity must come with clean hands. As stated by the Federal Court in the case of *Lau Kee Ko & Anor v. Paw Ngi Siu* [1973] 1 LNS 71; [1974] 1 MLJ 21:

> It is axiomatic that one of the conditions to justify a claim based on *quantum meruit* is that the plaintiff must not be at fault.

[27] In the circumstances of this case, the respondent submits that the appellant is not entitled to claim in *quantum meruit* for works allegedly done as they had come to court with unclean hands based on the following factors:

(i) it was the appellant's conduct in not informing the respondent that they had been wound up by the Kuala Lumpur High Court that had brought about the present state of affairs. The respondent was deceived into executing the infrastructure contract which it would not have done if it had known that the appellant was a wound-up company;

(ii) the appellant was in breach of s. 283 of the Companies Act 1965 as its quotation did not contain the words "in liquidation";

(iii) it was the appellant's own act in failing to obtain the sanction or approval of the official receiver to enter into the infrastructure contract which had caused the contract to become void and unenforceable; and

(iv) the appellant had stopped work on or about March 2013 and had subsequently abandoned the work site without completing the infrastructure contract and would thus be in breach of cls. 14.2 and 14.3 of the infrastructure contract.

[28] As such, the respondent submits that the appellant ought not to be allowed to take advantage of its own breach to claim in *quantum meruit*.

Decision

[29] After carefully considering the grounds of appeal and the written submissions and authorities of the parties, the court finds no merits in the appeal. On the various issues as raised by the parties, the court finds as follows:

(i) it is not in dispute that the appellant, at the time that it entered into the infrastructure contract to carry out infrastructure works, was a company under liquidation. The infrastructure contract was entered into on 21 December 2012. Based on established authorities, once the appellant was wound up, its board of directors becomes *functus officio* and would have no authority to enter into the infrastructure contract (see: *American International Assurance Berhad v. Coordinated Services L Design Sdn Bhd* [2012] 1 CLJ 506);

(ii) whilst the appellant may have obtained a perpetual stay of the winding-up order on 24 July 2013, following the decision in the case of *American International Assurance Berhad (supra)*, that stay could only take effect from that date and would not have retrospective effect to the date of the winding-up order. In the circumstances, the court finds that the stay order would clearly not have any retrospective effect to validate the entering into of the infrastructure contract on 21 December 2012, notwithstanding that the appellant may well have made full payment to its creditors;

(iii) apart from the fact that the infrastructure contract is void *ab initio* for the reasons as stated in paras. (i) and (ii) above, the appellant would still be disentitled to its claim for the RM423,818.75 because it had only produced a progress claim (Progress Claim No. 1) and the said claim was not certified. In light of the clear wording in cl. 9 which states that payment shall be made after issuance of the certificate of payment, and since no certificate was ever issued by SCCT Consulting to verify the work that was done, the issue of whether payment for the sum of RM423,818.75 or any other sum was due would not arise;

(iv) the appellant's attempt to rely on s. 66 of the Contracts Act 1950 is clearly unsustainable as the said provision is meant to provide some relief to a party whose right in an agreement becomes unenforceable through no fault of his (See: *Soh Eng Keng v. Lim Chin Wah* [1979] 1 LNS 98; [1979] 2 MLJ 91 at p. 92). The court in the case of *Yee Hoong Loong Corpn Sdn Bhd v. Kwong Fook Seng Co (supra)* cited by the appellant had also stated that the court "may order reasonable compensation for any benefit obtained and given under a void contract provided that both parties or the party so wronged did not know at the time of the contract that it was not valid". The court finds that the appellant knew that only the official receiver could act for it after its winding-up; that it had

A entered into the infrastructure contract without the sanction or approval of the official receiver and as such would not be entitled to invoke s. 66 of the Contracts Act 1950; and

(v) the appellant would not be entitled to claim in *quantum meruit* not just because the amount and value of the work allegedly done had not been certified, but also because the appellant had not come to court with clean hands. It was as a result of the appellant's actions in entering into the infrastructure contract when it was still a wound-up company, failing to obtain the approval and sanction of the official receiver to enter into the said contract that the appellant had found itself in the present position.

Conclusion

[30] For the reasons as enumerated above, the court had dismissed the appellant's appeal with costs of RM4,000.